Appendix A – Legal Opinion by Gavin Ralston Senior Council dated 22nd February 2019

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22nd February, 2019.

Re: Proposed Development, Construction of 212 Shared Living Spaces, Old School House, Eblana Avenue, Dun Laoghaire, Co. Dublin.

Dear Ms. Deignan,

Thank you for your instructions in this matter asking me to advise in relation to certain aspects of the Pre-Application Consultation Opinion received from An Bord Pleanala, (Case Reference ABP-302964-18). The consultation took place in relation to a proposed application under the provisions of the Planning and Development (Housing) and Residential Tenancies Act 2016. That is part of a statutory process in relation to the making of an application for a Strategic Housing Development (SHD) to be made directly to An Bord Pleanala.

I should commence by noting in relation to the type of development proposed that Section 3 of the 2016 Act has been amended in the Planning and Development (Amendment) Act 2018 by the inclusion in

Section 3 of a definition of "Shared Accommodation". That definition is as follows:

> "Shared Accommodation means a building or part thereof used for the provision of residential accommodation consisting of –
>
> (a) Communal living and kitchen facilities and amenities shared by the residents, and
>
> (b) Bedrooms rented by the residents,
>
> But does not include student accommodation or a building, or part thereof, used for the provision of accommodation to tourists or visitors."

In turn that definition is incorporated into the definition of Strategic Housing Development, again in Section 3 at sub-Clause B(a):

> "Development –
>
> (i) Consisting of shared accommodation units that, when combined, contain 200 or more bed spaces, and
>
> (ii) On land that the zoning of which facilitates the provision of shared accommodation or a mixture of shared accommodation thereon and its application for other uses."

I mention it only in the context that Shared Accommodation now enjoys a statutory meaning.

I note the observation in the Assistant Director of Planning's report, at page 3, that the Board will be concerned to receive assurance that the proposed development is truly a shared accommodation and not simply substandard self-contained/studio apartments. On my understanding of Bartra's proposal, there is absolutely an intention to provide "communal living", with cooking, lounge and recreational facilities provided on a communal basis. You should therefore take care to include a full description of the proposed accommodation and the means by which it will be occupied by guests.

The concerns of the Assistant Director seem to be centred around the fact that cooking facilities might be provided within each room. I do not think that the provision of a microwave oven and a two-ring hotplate could truly be regarded as a kitchen, although clearly a person may choose to remain within his or her room. The provision of such equipment is merely a convenience for those who wish to re-heat take away meals. Substantial kitchen and dining facilities are provided elsewhere in the accommodation on a communal basis. I understand from you that Bartra have now omitted the 2-ring hotplate in the current plans.

Dwelling

I am particularly asked to comment upon the final paragraph on page 3 which states:

> "You should also address the fact that a 'dwelling' is defined as being, inter alia, "a property let for rent ..... as a self-contained residential unit .....". (Ref: PT.1 S.4 of The Residential Tenancies Act 2004) and how your proposed bedroom format does, or does not, constitute a 'dwelling' given that definition. You should specify what measures you propose and/or what measures, if any, the Board could adopt in the event of a grant of permission to safeguard against the establishment of what could be defined as a dwelling when the floor area is only c.16 sq.m.".

It is my advice that the expression "dwelling" is inextricably linked to the notion that it is let for rent or other valuable consideration. That requirement clearly envisages the relationship of landlord and tenant as applying to any arrangement. The relationship of landlord and tenant was defined as far back as the Landlord and Tenant (Amendment) Act Ireland 1860, Section 3 of which is as follows:

> "The relationship of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties and not upon tenure or service and a reversion shall not be

necessary to such relation which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent".

If a property holding does not fall within that definition it is not in my view a "letting".

It follows therefore that if a property is not let for rent but is held under some other basis, it does not come within the definition of a dwelling for the purposes of the 2004 Act. The definition of dwelling in the Act is clearly a twofold test, (a) whether it is physically constructed as a self-contained residential unit and (b) whether it is let. One being a physical attribute, the other being a legal consideration.

I am aware in other cases that parties have frequently sought to categorise a letting agreement as a licence by use of different terminology. I confirm my view that simply referring to the parties as "licensor" and "licensee", referring to the payment as a "licence fee" rather than a "rent", does not, of itself, constitute such agreement to be a licence. However, I understand that Bartra intends to introduce an entirely new concept of "shared living", not hitherto seen in this jurisdiction, whereby occupiers will be entitled to live in the entire property and have the use of all the shared facilities, based upon Club membership. Bedrooms, which will not be self-contained, but will be allocated to members for periods of from 2 months to 12 months, on a first come basis. In those circumstances it is my opinion that there would not be a self-contained residential unit available for letting within the meaning of Section 4 of The Residential Tenancies Act 2004 as amended. I have appended hereto a draft form of an agreement for Shared Living for your consideration. It is also the case that such accommodation would not come within the Housing (Standards for Rented Houses) Regulations, 2017, as referred to later in this letter.

The report of the Assistant Director of Planning quries what measures should be specified to safeguard against the establishment of what might be regarded as a dwelling and hence sub-standard. It is, of course the case that the definition of dwelling for the purposes of The

Residential Tenancies Act 2004 is not necessarily the same definition as is applicable to the Planning Acts. A house is defined in section 2 of the Planning and Development Act 2000 as follows:

> " "House" means a building or part of a building which is being or has been occupied as a dwelling but was provided for use as a dwelling but has not been occupied and where appropriate includes a building which was designed for use as two or more dwellings or a flat and apartment or other dwelling within such a building."

Dwelling within that definition is not itself defined within the planning legislation. From that perspective a dwelling would, in my view, have a common sense or possibly a dictionary definition, meaning a place where a person dwells. That could mean any form of accommodation without reference to the legal title under which a person occupies that dwelling.

The Housing Acts have a separate, although very similar, definition of "House", in Section 1(1) of The Housing (Miscellaneous Provisions) Act, 1979, as follows:

> ""House" includes any building or part of a building used or suitable for use as a dwelling and any out office, yard, garden or other land appurtenant thereto or usually enjoyed therewith and, "housing" shall be construed accordingly."

However, when considering the application of the Housing (Standards for Rented Houses) Regulations, 2017, Regulation 3 states as follows:

> "3. (1) Subject to paragraph 2, these Regulations shall apply to every house let, or available for letting, for rent or other valuable consideration solely as a house unless the house is let or available for letting:-
>
> (a) To a person only for the purpose of conferring on that person the right to occupy the house for a holiday,

(b) By the Health Service Executive or by an approved body, as accommodation with sanitary, cooking or dining facilities provided for communal use within the building which contains the house, or

(c) By a Housing Authority pursuant to any of their functions under The Housing Acts, 1966 to 2014, and is a caravan, mobile home or a structure or a thing (whether on wheels or not) that is capable of being moved from one place to another (whether by towing, transport on a vehicle or trailer or otherwise).

It will be seen therefore that the manner in which the "house" is occupied dictates whether it is covered by the Regulations or not. Similar to the notion of a Dwelling in the Residential Tenancies Act the manner of occupation is relevant. In my view, the purpose of the Housing Standards for Rented houses, is to provide such standard where the property is for letting in the legal sense. The Regulations do not otherwise prescribe standards that would be applicable to Communal living.

If I can be of further assistance, please let me know.

Yours sincerely,

GAVIN RALSTON SC